No. 88-1597

Supreme Court, U.S.
FILED
SEP 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1989

The Board of Education of the Westside Community Schools (Dist. 66); Wayne W. Meier, President of the Westside Community School Board; James E. Findley, Principal of the Westside High School; James A. Tangdall, Assistant Superintendent of the Westside Community School District; and Kenneth K. Hansen, Superintendent of the Westside Community School District,

Petitioners,

Bridget C. Mergens, by and through her next friend, Dr. Daniel N. Mergens; Stephen P. Hollar, by and through his next friend, Mrs. Judith L. Hollar; Brian P. Rensing, by and through his next friends, Robert W. and Sherry K. Rensing; David K. Harris, by and through his next friends, Kenneth and Myra Harris; and Andrea Simmons, by and through her next friends, Robert L. and Linda L. Simmons,

Respondents,

United States of America,

Respondent,

Kendra K. Kellison, etc. by and through her next of friends, Victor Kraatz and Linda Kraatz; Michelle M. Harris, etc. by and through her next of friends, Kenneth Harris and Myra Harris; and Kevin Brown, etc. by and through his next of friends, Robert W. Rensing and Sherry K. Rensing; Matt Schulz; Ingrid Kimmons; Jason Brone; Jennifer Waggoner; and Allison Wells,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF PETITIONERS

ALLEN E. DAUBMAN
Counsel of Record
VERNE MOORE, JR.
KOLEY, JESSEN, DAUBMAN & RUPIPER, P.C.
One Pacific Place, Suite 800
1125 South 103rd Street
Omaha, Nebraska 68124
(402) 390-9500

MARC D. STERN
AMY ADELSON
LOIS C. WALDMAN
JEREMY S. GARBER
American Jewish Congress
15 East 84th Street
New York, New York 10028
(212) 360-1545

Counsel For Petitioners

Questions Presented

The Equal Access Act, 20 U.S.C. §4071 et. seq. prohibits federally funded secondary schools sanctioning "noncurriculum related" student initiated "meetings" from discriminating on the basis of the content of speech against other student initiated "meetings." The questions presented are:

1. Whether, by requiring schools which officially sponsor co-curricular student clubs to officially sponsor student) religious meetings, the Act unconstitutionally establishes religion, particularly when enforced against a school which permits informal religious meetings, but refuses to grant them official sanction.

2. Whether, for purposes of the Act or the Free Speech Clause, certain types of student "meetings" are necessarily "noncurriculum related," and thus create a limited open forum, notwithstanding a determination by school officials that those "meetings" are curriculum related, and that only curriculum related activities will be permitted.

PARTIES TO THE PROCEEDINGS

All parties to the proceeding are listed in the caption. The caption reflects additional respondents added by virtue of an order of the U.S. Court of Appeals for the Eighth Circuit, entered on March 28, 1989.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceedings . . . ii

Table of Contents iii

Table of Authorities vi

Citations to the Opinions and Judgments Below 2

Jurisdiction 2

Constitutional and Statutory Provisions. 3

Statement of the Case 3

The District Court's Opinion . . 24

The Court of Appeals' Opinion. . 25

Summary of Argument. 27

Argument 32

I. WHS IS NOT A TRADITIONAL PUBLIC FORUM 33

II. WHS'S SCHOOL ACTIVITIES PROGRAM IS NOT A LIMITED FORUM 38

A. The Appropriate Focus is the Club Program 38

B. The Trial Court's Finding of a Closed Forum Was Correct 39

C. WHS Has Legitimate Pedagogical Reasons for Refusing to Recognize a Christian Bible Club . 50

D. The Christian Bible Club Would Radically Restructure the Forum 54

III. WHS HAS NO NONCURRICULUM RELATED CLUBS FOR PURPOSES OF THE EQUAL ACCESS ACT 56

A. The Act Balances Three Concerns 58

B. WHS'S Clubs Are Curriculum Related 70

IV. THE CONSTITUTION FORBIDS INCORPORATING A RELIGIOUS CLUB INTO AN OFFICIALLY SPONSORED STUDENT ACTIVITIES PROGRAM . . . 81

A. The Students Seek Endorsement of Their Religious Club . 82

B. An Officially Sponsored Christian Bible Club Would Entangle the School With Religion 87

C. The Court Need Not Reach the Impressionability Issue . 89

Conclusion 91

Table of Authorities

Cases

Aguilar v. Felton,
473 U.S. 402 (1985). 88

Anderson v. City of
Bessemer City,
470 U.S. 564 (1985). 42

Bell v. Little Axe Independent
School District,
766 F.2d 1391
(10th Cir. 1985) 47

Bender v. Williamsport Area
School District,
766 F. Supp. 679
(M.D. Pa. 1983),
rev'd, 741 F.2d 538,
(3d Cir. 1984)
rev'd on other grounds,
475 U.S. 534 (1986) 24, 43
47

Bethel School Dist. v. Fraser,
478 U.S. 675 (1986). 80

Board of Directors of Rotary Intern. v. Rotary Club, 479 U.S. 537 (1987) 76

Board of Educ., Island Trees U. Free School Dist. v. Pico 457 U.S. 853 (1982) 36, 62

Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) 35

Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985) 35, 38 39, 40-41 42, 52, 53, 54

County of Allegheny v. ACLU 109 S. Ct. 3086 (1989) 52, 85 86

Davis v. Michigan Dep't of Treasury, 109 S.Ct. 1500 (1989) 60

Edwards v. Aguillard 107 S.Ct. 2573 (1987) 50, 52 90

Engel v. Vitale 370 U.S. 421 (1962) 54

Epperson v. Arkansas
393 U.S. 97 (1968) 63

Garnett v. Renton Area
School District,
865 F.2d 1121
(9th Cir. 1989) 47
68-69
81

Grand Rapids School Dist. v. Ball,
465 U.S. 373 (1985) 85

Grayned v. City of Rockford,
408 U.S. 104 (1972) 33

Greer v. Spock
424 U.S. 828 (1976) 52

Hague v. CIO
307 U.S. 496 (1939) 34

Hazelwood School District
v. Kuhlmeier,
108 S.Ct. 562 (1988) 25,33
41,48,50

Healy v. James,
408 U.S. 169 (1972) 80,81

Keyishian v. Board of Regents
385 U.S. 589 (1969) 36

Larkin v. Grendels Den,
459 U.S. 116 (1982) 85

Lehman v. Shaker Hts.
Rapid Transit
418 U.S. 298 (1974) 52

Lemon v. Kurtzman,
403 U.S. 602 (1973) 88

Lubbock Civil Liberties
Union v. Lubbock Independent
School District, 669 F.2d 1038
(5th Cir. 1982),
cert. denied,
459 U.S. 1159 (1983) 47

Perry Education Association
v. Perry Local Educators
Association,
460 U.S. 37 (1983) 39,40
41,42
53,55
60

Public Citizen v. United States Department of Justice
109 S.Ct. 2558 (1989) 82

Pullman-Standard v. Swint
456 U.S. 273 (1982) 42

Student Coalition for Peace v. Lower Merion School Dist.
776 F.2d 431 (3rd Cir. 1985). . 56

Texas v. Johnson
109 S.Ct. 2533 (1989) 35

Tinker v. Des Moines Independent School District
393 U.S. 503 (1969) 50

Wallace v. Jaffree
472 U.S. 38 (1985) 66

Widmar v. Vincent
454 U.S. 263 (1981). 24,26
39,42,43
55,59,85,90

CONSTITUTIONS AND STATUTES

U.S. Const., Amend. I . . . . . passim

Equal Access Act,
20 U.S.C. §§ 4071 - 4074 . . . passim

28 U.S.C. § 1254 (1) 2

28 U.S.C. § 1331 2

28 U.S.C. § 1343 2

20 U.S.C. § 953 63

20 U.S.C. § 3403(c) 63

OTHER AUTHORITIES

Griffen, Student Activities in the Middle School: What Do They Contribute, N.A.A.S.P. Bulletin (April 1988). 49

New York Times, July 19, 1989,
p. C-5, col. 1 76

Title I, Proposed National
Community Services Act
of 1989 (S. 1430). 77

Menacker and Wynne, Helping
Students to Serve Society,
Phi Delta Kappa (F.S. 1982) . . . 77

130 Cong. Rec. S. 6651 63,64
(daily ed. June 6, 1984)

130 Cong Rec. S. 8331 - 8372
(daily ed. June 24, 1984) . . . 63,64

130 Cong. Rec. S. 8341
(daily ed. June 27, 1984) . . . 25

130 Cong. Rec. S. 8342,
(daily ed. June 27, 1984) 65,70
71,73
78

130 Cong. Rec. S. 8357
(daily ed. June 27, 1984) 26

130 Cong. Rec. S. 8358
(daily ed. June 27, 1984) 27

130 Cong. Rec. H. 3855 - 3879
(daily ed. May 15, 1984) 64

130 Cong. Rec. H. 7723 - 7745
(daily ed. July 25, 1984) 64

130 Cong. Rec. H. 7732
(daily ed. July 25, 1984) . . 70,71
73

130 Cong. Rec. H. 14,473 - 14,476
(daily ed. Oct. 11, 1984) . . . 21

S. 1059, 98th Cong.
1st Sess. (1983) 61

H.R. 2732 98th Cong.
1st Sess. (1983) 61

H.R. 4172, 98th Cong.
1st Sess. (1983) 61

S. Rep. No. 98-357, 98th Cong.,
2d Sess. (1984) 70,73

No. 88-1597

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

The Board of Education of the Westside Community Schools (Dist. 66); Wayne W. Meier, President of the Westside Community School Board; James E. Findley, Principal of the Westside High School; James A. Tangdall, Assistant Superintendent of the Westside Community School District; and Kenneth K. Hansen, Superintendent of the Westside Community School District,

Petitioners,

Bridget C. Mergens, by and through her next friend, Dr. Daniel N. Mergens; Stephen P. Hollar, by and through his next friend, Mrs. Judith L. Hollar; Brian P. Rensing, by and through his next friends, Robert W. and Sherry K. Rensing; David K. Harris, by and through his next friends, Kenneth and Myra Harris; and Andrea Simmons, by and through her next friends, Robert L. and Linda L. Simmons,

Respondents,

United States of America,

Respondent.

Kendra K. Kellison, etc. by and through her next of friends, Victor Kraatz and Linda Kraatz; Michelle M. Harris, etc., by and through her next of friends, Kenneth

Harris and Myra Harris; and Kevin Brown, etc., by and through his next of friends, Robert W. Rensing and Sherry K. Rensing, Matt Schulz, Ingrid Kimmons, Jason Brune, Jennifer Wagoner, and Allison Wells,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the
Eighth Circuit

BRIEF OF THE PETITIONERS

Opinions Below

The opinion of the court of appeals (Pet. App. A 1-21) is reported at 867 F.2d 1076. The memorandum decision of the district court (Pet. App. B 1-30) is not reported.

Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The district court's jurisdiction was invoked pursuant to 28 U.S.C. §§ 1331 and 1343.

CONSTITUTIONAL AND STATUTORY PROVISIONS

First Amendment to the Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . ."

The Equal Access Act, P.L. 98-377, 98 Stat. 1303, 20 U.S.C. §§ 4071-4074 is reprinted as Appendix C to the Petition for Certiorari.

STATEMENT OF THE CASE

School officials at Westside High School ("WHS" or the "School") subscribe to a recognized theory of education that incorporates student after-school activities into the overall School curriculum. Every student activity or club, therefore, must advance the educational "mission and goals" of the School. [J.A. 220, 230,

296-97].[1] Students are encouraged to participate in the after-school activities program, and all activities must receive official approval, must operate under the control of School administrators, and must have a faculty sponsor. Religious and political advocacy groups, however, may not receive official sponsorship.

This policy is formalized in Policy 5610 of the Board of Education of Westside Community Schools (the "School Board") [J.A. 488].[2] Both Dr. James Findley, the

---

[1] Citations to the Joint Appendix are to J.A. _____. Those portions of the trial transcript not incorporated in the Appendix are cited as Tr. _____. The Court of Appeals' opinion, reproduced as Appendix A to the Petition for Certiorari, is cited as App. Pet. _____. The District Court's opinion, reproduced as Appendix B to the Petition for Certiorari, is cited as App. Pet. B _____.

[2] WHS is operated by the Westside Community Schools, known as District 66, which in turn is managed, governed, and controlled by the Board of Education of the Westside Community Schools. (Pre-Trial Order #1-3, J.A. 57).

principal of WHS, and Dr. James Tangdall, the associate superintendent,[3] testified that, in addition to reflecting WHS' educational philosophy, Policy 5610 also expresses the sentiment of parents in their community who are opposed to permitting "an unrestricted," unsupervised student activities program and who want the School to exercise control over student clubs. [J.A. 220, 243-44, 257-58, 324-25].

In the Fall of 1984, School administrators met to discuss the impact of the newly passed Equal Access Act (the "Act") on the School's activities program. They concluded that, since Policy 5610 demanded that all clubs be School sponsored and

---

[3] Dr. Findley has been principal since 1984 and was an administrator at WHS since 1971. Dr. Tangdall was the prior principal of WHS and began teaching there in 1956. Both men have been intimately involved in the running of the School for many years. [Tr. 254-257, 385-387].

curriculum related, the School did not have a limited open forum as defined in the Act. [J.A. 259, 316-17].

Although all clubs at WHS are officially sponsored, students at WHS are permitted to meet informally to discuss their personal interests, including religion. [J.A. 105, 135-36, 194, 322, 426-27, 431, 438-41]. The School board also permits non-school-related groups to use the School facilities, usually for payment of a fee. [School Board Policy 7260, J.A. 456-61]. Boy and Girl Scouts and similar youth groups may use the building without charge, provided the building is otherwise open. These uses of the building are not part of the student activities program and do not carry with them access to the School newspaper, the public address system, or the Club Fair. [J.A. 434-35].

For many years School administrators knew that Respondent Bridget Mergens ("Mergens") would "visit" with other students to discuss the Bible, and they allowed her to do so without interference. [J.A. 315-16].

In January, 1985, Mergens, then a senior, approached Dr. Findley and asked him very generally about allowing students who "had similar beliefs in God" to meet before or after school for fellowship and prayer. [J.A. 71-72, 79]. Initially, Dr. Findley thought she was asking about the informal meetings that had been going on for years, and he told her that was not a problem. Mergens, however, explained that she wanted the group to be officially recognized by the School. Dr. Findley turned her down because formal recognition would contravene School Board policy. [J.A. 243-45]. Dr. Tangdall, who also

knew about Mergens' informal Bible group, and Dr. Kenneth Hansen, the superintendent, subsequently affirmed that an officially recognized Bible Club would be contrary to Board policy. [J.A. 345-46].

Dr. Tangdall and Dr. Findley met with Mergens to explain their decision. [J.A. 80-82, 317-18]. Dr. Findley suggested that the students consider using the church next door, to which he would try to gain access. Mergens rejected that offer [J.A. 81-83],[4] and in March, 1985, appealed the School administrators' decision to the School Board. The School Board upheld the denial of her request. [Pretrial Order #15, J.A. 59].

By this time, Mergens and several other students, some of whom are

---

[4] Many of the students who testified at trial claimed that the church was unacceptable because it was inconvenient or because they did not want to meet on terms that differed from other student clubs. [J.A. 107, 141, 146, 165].

plaintiffs in this action (hereafter "the students"), had settled on the para-meters of their request. They wanted to form an open, nondenominational "Christian Bible Club." [J.A. 117, 113-34, 164-65]. It was to be "identical in its formation, rights, privileges, terms, and conditions as other Westside High School affiliated students' clubs," except that it "would not have a faculty sponsor." [Pretrial Order #13, J.A. 59]. This meant that the Christian Bible Club would participate in the annual Club Fair and have access to the School's bulletin boards, the public address system, the School newspaper, and the yearbook. [J.A. 100-01, 119, 132, 155-56, 419-422].

The decision to refuse official recognition to a Christian Bible Club was

based on several considerations.[5] Perhaps foremost, the Christian Bible Club, unlike all other clubs, would not be under the direct control of the administration and have faculty sponsorship, as required by Policy 5610. Faculty sponsors, who are generally paid for their participation, [Tr. 353], oversee the activities of all clubs. [J.A. 239, 250-51, 259-62]. Sponsors do not necessarily attend every club meeting, and not every sponsor is equally involved in the club's activities. [J.A. 111-12, 123-24]. Nevertheless, every sponsor is responsible for making sure that the clubs develop and maintain goals and objectives and that the clubs

---

[5] This was not the only denial of a request to form a club. Over the years, suggested clubs had been refused because of finances, difficulties in scheduling, or lack of interest. [J.A. 293-94]. Several years ago, the School turned down a request for a Dungeons and Dragons Club because it was deemed inappropriate. [J.A. 367].

further the "goals and mission" of WHS and do not advocate specific ideological viewpoints. The School's educational goals, according to Dr. Findley and Dr. Tangdall, are furthered only when both sides of controversial issues are explored, whether in the classroom or in clubs. [J.A. 245-48, 254-55, 326-27, 273].[6]

The School has never permitted advocacy clubs, since they cannot comply with this policy. [J.A. 273-74]. A Christian Bible Club, presenting religious issues from a Christian perspective and operating without the moderating influence

---

[6] The School permits relevant, controversial issues to be discussed in the classroom. On one occasion, an English teacher showed excerpts from the film, The Omen, in connection with a study of the play, The Crucible. Planned Parenthood has visited sociology courses focusing on marriage to discuss birth control and related issues. School officials, however, insist that faculty members insure a balanced discussion. [J.A. 95-100, 171-74, 278-80, 308].

of a faculty sponsor, would not comply with the School's "mission and goals." [J.A. 298-299, 311, 426, 441-443].

School officials also were concerned that, by allowing even one unsponsored, noncurriculum-related club to meet formally, they would open access to their forum to all advocacy groups, contrary to what they viewed as the School's educational mission. [J.A. 98, 315-316, 450]. And finally, School officials were concerned that some students could perceive of the School's official recognition of even an unsponsored Christian Bible Club as an endorsement of religion or of a particular religious perspective. [J.A. 312, 345-46, 349, 435-36, Tr. 362].[7]

---

[7] At least some of the students themselves appreciated that the very existence of a Christian Bible Club could encourage other students who "would like to become Christians and follow God." [J.A. 185]. Mergens told Dr. Findley that she wanted the Club to be able to "get to" the School's nonreligious students.

Although Mergens and the other students were refused official recognition for their Christian Bible Club, they were never prohibited from discussing religion among themselves. [J.A. 105-06, 128-30, 135-36, 140, 176, 193-94, 203-04]. Dr. Findley even told Mergens that her group could meet informally, provided the meetings were not so regular they were simply a form of club, without faculty sponsorship. [J.A. 114-15, 432-34, 450].[8] But official recognition is precisely what the students wanted for their Christian Bible Club. [J.A. 115, 156, Tr. 129].

In April 1985, the students commenced this action, claiming that the refusal to sanction the proposed Christian Bible Club violated the First Amendment, the Act, and

---

[J.A. 252].

[8] Dr. Findley testified that he would not allow any group, even a checkers club, to meet regularly without official sponsorship. [J.A. 451-52].

various state constitutional provisions. [J.A. 14].[9] A four-day trial commenced in May 1987. At trial, both sides explored at length the School's student activities program and its relation to the School's curriculum. The students focused on ten clubs they contend are noncurriculum-related under the Act:

Interact
Chess
Subsurfers
National Honor Society
Photography
Welcome to Westside
Future Business Leaders of America
Zonta
Student Advisory Board
Student Forum

(Pretrial Order #17, J.A. 60).

---

[9] In May 1985, the district court denied the students' motion for a preliminary injunction and, in October, their motion for summary judgment. In August 1985, the United States intervened pursuant to 28 U.S.C. §2403(a) to defend the Act's constitutionality. The United States did not actively participate in the trial. Since all but one of the original plaintiffs had graduated by the time the case reached the Eighth Circuit, additional plaintiffs, who will not graduate for several years, have been added.

Attendance at these club meetings is voluntary, although club participation can earn extra credit in some classes. [J.A. 230, 444]. Participation is not conditioned upon attendance in any class. [J.A. 93-94, 122-23, 222-25]. School officials uniformly agreed that each of the clubs was intended to further either the goals and objectives of specific aspects of the School's curriculum or of its overall program.

Several of the contested clubs are integrally related with the functioning of the School as an institution. The National Honor Society, for example, is not a club in the sense that students with an interest can join at will. Rather, students are elected to the Society by a faculty committee based on leadership, service, character, and scholarship. [J.A. 267-68, 305, 327-28]. As

Dr. Tangdall testified, National Honor Society is directly related to all . . . courses because it is a way to honor students who have succeeded academically." [J.A. 305].

Welcome to Westside provides the School with a vehicle to introduce new students to other students and to the School's facilities. When a new student arrives, the faculty sponsor contacts a member of the "club," who then introduces the student. [J.A. 168-70, 194-95]. School officials testified that this activity helped further the School's overall goal of developing effective citizens by requiring student members to contribute to their fellow students. [J.A. 305, 328-29].

Two of the contested clubs, Student Advisory Board, consisting of six elected representatives from each class, and

Student Forum, consisting of an elected representative from each homeroom, operate as the student government. [J.A. 446-47]. School officials testified that both "houses" of the student government advance the goals of the School's political science classes by providing an understanding and appreciation of government processes. [J.A. 270-73, 306, 445-47].

Several clubs promote specific academic objectives. Future Business Leaders of America, strongly endorsed by the State Board of Education, invites outside speakers to discuss their businesses and how they relate to School activities. [J.A. 354, 377-79, 447-49]. Dr. Tangdall explained that the club advances the goals of the School's extensive Business Department, which offers courses in accounting, business law, marketing, and sales. [J.A. 448-50].

Subsurfers provides students with an opportunity to learn scuba diving.[10] School officials view the club as furthering one of the essential goals of the Physical Education Department--enabling students to develop life-long recreational interests. [J.A. 305]. Dr. Tangdall testified that the School offers an array of physical activities like scuba diving because students are more likely to pursue those activities into adulthood than they are traditional sports such as football. [J.A. 445].

Chess is uniformly considered by WHS' educators to supplement math and science courses because it enhances students' ability to engage in critical thought

---

[10] The Subsurfers' faculty sponsor provides the equipment and instructs students in its use. [J.A. 184]. An outside group, Underwater World, participates in the scuba diving class to enable participating students to obtain certification. [J.A. 304, 307].

processes. [J.A. 220-21, 304, Tr. 498]. Several years ago, the head of the Mathematics Department requested that chess be permitted in the Math Resource Room because active chess players performed better in math classes. This caused some disruption, so chess playing was restricted to the Chess Club. [J.A. 443-44].[11]

The remaining contested clubs, Interact and Zonta,[12] are service clubs. Student members provide community service, such as collecting food for the poor. [J.A. 289]. Participation in Interact and Zonta promotes effective citizenship, a critical goal of the WHS curriculum, specifically the Social Studies Department.

---

[11] Photography, formerly a club, has recently become a class in the Art Department. [J.A. 444-45].

[12] Interact is related to the Rotary Club. Zonta is the female counterpart of Interact and is affiliated with Zonta International. [J.A. 225, 287, 305-06].

[J.A. 225-26]. In certain Social Studies classes, participation in community projects earns extra credits; at one time, it was required of all students. [J.A. 444].

To counteract this testimony, the students introduced the testimony of Dr. Ward Sybouts, an expert on curriculum and student activities. [Tr. 562-64]. Dr. Sybouts explained that there are differing theories about what constitutes the "curriculum" of a school. Some theorists view the curriculum broadly, as part of the "total learning experience." [J.A. 406-08]. Others view it narrowly, as only those courses granted for credit. [Tr. 572-73]. Neither view is necessarily correct, although Dr. Sybouts subscribes to the broader view shared by Westside's educators: he defines curriculum to include "all the school-related experiences provided for the growth and devel-

opment of pupils," including the "school's activities programs." [J.A. 416-17].

Dr. Sybouts views the Equal Access Act[13] as incorporating a narrower view of curriculum. As he reads the Act, Subsurfers, for example, would be curriculum related because it relates to Physical Education courses.[14] Other clubs, Interact or Student Forum, for example, which do not on their face relate to specific courses, would not. [J.A. 409-11]. Dr. Sybouts, however, admitted that this was a "hard line to draw," [J.A. 409], and several purportedly

---

[13] Dr. Sybouts' opinion was based in part on Equal Access guidelines prepared by a variety of nongovernmental organizations after the Act's passage. [J.A. 410]. It was a guide for schools, not an authoritative construction of the Act. See 130 Cong. Rec. H.14,473 - 14,476 (daily ed. Oct. 11, 1984).

[14] Under this view, National Honor Society would also be curriculum-related because admission to it depends on academic achievement. [J.A. 411].

noncurriculum clubs would be curriculum related if they advanced the goals and objectives of a specific course. [J.A. 413-16].

Thus he agreed that Student Forum would be curriculum related if designed "to help students develop a better understanding of our society and our government and how it works," [J.A. 414], and Interact would be curriculum related if the Sociology Department promoted "community service." [J.A. 414-16]. These are the goals and objectives of the School's Social Studies Department. [J.A. 444-46]. Therefore, even under Dr. Sybouts' opinion that the Act incorporates a narrower view of curriculum, the clubs in question are related to curriculum.

At trial, both sides also explored how an officially sanctioned Christian Bible Club might be perceived by students.

Dr. David Moshman, an expert in the area of child development and an advocate of extending broad First Amendment rights to children [J.A. 380-84], testified that, in his view, since children develop "formal operational reasoning" by the ages of 11 or 12, if a school made it clear that allowing a voluntary student group did not constitute school support for the group, high school students would understand this distinction. [J.A. 388, 397-400].

Dr. Moshman admitted, however, that "formal operational reasoning" continues to develop through adulthood [J.A. 389-90]; that children "differ greatly in how widely they apply it" [J.A. 390]; and that college-age students are generally more capable of formal operational reasoning because they have a greater wealth of experience. [J.A. 395].

The School's educators had a different opinion about the reasoning capabilities of their students. They explained that a Christian Bible Club at WHS would be perceived by some students as an endorsement of religion, particularly since the School encouraged club participation but had never permitted a club without faculty sponsorship. [J.A. 423-25, 435-37].

The District Court's Opinion

The United States District Court for the District of Nebraska entered judgment for the Board, finding that the School Board had not created a limited public forum in its student activities program:

> [T]hose clubs which are currently permitted to utilize the facilities at WHS are curriculum related and tied to the educational function of the institution. The club system plan at WHS differs dramatically from those found to create an open forum policy in Widmar and Bender. [Pet. App. B 25-26].

The District Court also held that the Board's refusal to sanction the Christian Bible Club, although restrictive of speech, did not violate the students' freedom of speech because it was "reasonably related to [the] legitimate pedological concern," Hazelwood School Dist. v. Kuhlmeier, 108 S.Ct. 562, 571 (1988), that all sanctioned school activities present balanced views on controversial issues, a policy enforced with respect to both curricular and co-curricular activities. Moreover, the restriction was reasonable, since WHS students remained free to engage in non-sanctioned religious speech on school premises.

The Court of Appeals' Opinion

The Eighth Circuit reversed. It did not hold the District Court's finding that the student activities program at WHS was

a closed forum "clearly erroneous." Nevertheless, without explaining which clubs (other than the chess club) were "noncurriculum related" or offering any justification for rejecting the School officials' explanation of curriculum relatedness, the Court concluded that "many of the student clubs at WHS, including the chess club, are 'non-curriculum related.'" [Pet. App. A 14].[15]

The Eighth Circuit also rejected the Board's argument that the Act unconstitutionally established religion. [Pet. App. A 14-16]. It noted that the Act tracked Widmar v. Vincent, 454 U.S. 263 (1981), and that the only question was

---

[15] The Court cited excerpts of the Act's legislative history suggesting that the definition of "noncurriculum related" meetings was intended by Congress to be "fairly broad." The definition of curriculum relatedness urged by school officials would, the Court wrote, allow the Act to be overturned by administrative fiat. [Pet. App. A 14-15].

whether high school students were as capable as college students of distinguishing school sponsored from school tolerated activities. The Court adopted as its own Congress' determination that there was no legally relevant difference between high school and college students.

SUMMARY OF ARGUMENT

Three primary issues are presented by this case: first, whether the First Amendment free speech rights of the students have been violated by reason of the refusal of WHS to permit the Christian Bible Club; second, whether the student clubs at WHS trigger the applicability of the Equal Access Act; and third, if the Equal Access Act is applicable, whether it violates the Establishment Clause by requiring WHS to officially sponsor the

Christian Bible Club because WHS officially sponsors other co-curricular clubs.

WHS, like other public high schools, is not a traditional public forum for purposes of free speech constitutional analysis. The more difficult question is whether WHS is a limited open forum or a closed forum. The appropriate focus of this question is the club program at WHS--the forum to which the students seek access. In this context, the club program at WHS constitutes a closed forum, as found by the Trial Court. WHS has not opened its club doors for public discourse. Rather, it has maintained its authority and control over access to that forum, limiting such access to student clubs which are officially sanctioned by WHS and which operate, by policy and practice, under the direct control and supervision of School officials.

WHS controlled the club forum as part of its educational program. WHS has a legitimate pedagogical reason for determining that it should avoid the appearance of religious partisanship and the attribution to it of religious speech.

Perhaps recognizing the inherent difficulties in seeking access to the forum that actually existed, the students seek transformation of the forum and access to that forum, as transformed. Instead of a true sponsorship for which WHS faculty members were responsible and accountable, the students sought access without a sponsor or, if required by WHS, a faculty member who would serve only in the capacity of a monitor. The students sought a forum as contemplated by the Equal Access Act and as was presented in Widmar, but such a forum was not to be found at WHS.

The clubs at WHS are not noncurriculum related under the Equal Access Act. Rather, they all are directly related to the core curricula. The environment at WHS is first defined by its missions and goals, which are then carried out through the educational program. This educational program is comprised of structured classes and structured (although to a lesser degree) co-curricular clubs and activities. The nonexistence of noncurriculum-related clubs definitionally precludes a finding of a limited open forum under the Equal Access Act. Accordingly, the Act is not applicable under the facts of this case.

The construction of the Equal Access Act urged herein is a correct interpretation of the plain language of the statute, accurately reflects its legislative history, and avoids the

Establishment Clause problems if the Act was applied to require WHS to officially sanction the Christian Bible Club.

The students sought WHS endorsement of the Christian Bible Club and its inclusion within the WHS programs and activities. This union of state and religion contradicts the fundamental premise of the Establishment Clause. The WHS student activities program is not only capable of being viewed as government speech -- it is government speech. The high degree of sponsorship, direction, and control of student clubs at WHS would constitute the advancement of religion by reason of sanctioning the Christian Bible Club and would become excessively entangled in religious matters relating to that club, in violation of the second and third programs of the Lemon test.

The students' insistence on official endorsement of their Christian Bible Club means that recognition of that club would construct an impermissible relationship between church and state, without regard to the age and maturity of high school students. Therefore, the impressionability issue need not be reached.

ARGUMENT

Student clubs are an integral part of WHS' educational program, not recreational activities whose sole relation to the School is physical presence in its building. Neither the Constitution nor the Equal Access Act requires School officials to restructure their student activities program in order to incorporate a religious club.

I

WHS IS NOT A TRADITIONAL PUBLIC FORUM

A public high school is not a traditional public forum. Hazelwood School Dist. v. Kulhmeier, 108 S.Ct. 562, 567 (1988). Students have no "absolute constitutional right to use all parts of a school building . . . for . . . unlimited expressive purposes." Graynerd v. City of Rockford, 408 U.S. 104, 117-918 (1972).

Hazelwood notwithstanding, the students claimed below that WHS was a traditional public forum because "its facilities [were open] to the public at large for participation in class and student activities." [Appellants' Brief at 15]. In support of this surprising contention, the students noted that non-students used school swimming, scuba diving, and weightlifting facilities.

[J.A. 158-59], 167-68, 236-38]. The Boy Scouts and the Fellowship of Christian Athletes were permitted in the past the use of the gym-nasium after school hours. [J.A. 360, 455-61]. Public officials and outside groups were occasionally invited to address classes or assemblies. Contro-versial topics were regularly discussed in classrooms. [J.A. 95-99, 126-27, 278-80, 321-22, 451, Tr. 480-81].

The primary purpose of a public forum is "assembly, communicating thoughts between citizens, and discussing public questions." Hague v. C.I.O., 307 U.S. 496, 515 (1939). The evidence marshalled to prove the existence of a traditional public forum falls woefully short of meeting this standard.

Much of the evidence presented by the students related to nonspeech activities. Since a traditional public forum is a

place exemplified by and defined in terms of unrestrained speech, Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, (1985), only proof that unrestrained speech takes place is relevant to the existence of a traditional public forum. And not every human activity is speech. Texas v. Johnson, 109 S.Ct. 2533 (1989); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 300 (1984) (Burger, J., concurring).

Weightlifting and scuba diving are athletic activities, not speech. Neither one conveys an idea or communicates any message. A swim protesting the deteriorating ocean environment might be speech. Texas v. Johnson, 109 S.Ct. at 2539-40. Ordinary recreational swimming is not. Its presence at WHS, and the presence of other nonspeech activities, is irrelevant

to the existence of a traditional public forum.

Nor can the existence of a traditional public forum be premised on WHS' occasional invitation to public officials or outside organizations to address students on matters related to the curriculum. [J.A. 41, 356-57, 451]. Public schools may encourage students to debate issues of public concern. They may also transmit community values, a responsibility at times inconsistent with the encouragement of debate and free inquiry. Board of Educ., Island Trees U. Free School Dist. v. Pico, 457 U.S. 853 (1982); Keyishinian v. Board of Regents, 385 U.S. 589 (1969). Balancing these sometimes conflicting functions is the task of democratically elected school boards.

Some parents and students may disagree with WHS' invitation to Planned

Parenthood to discuss birth control or the views expressed by invited public officials. Nonetheless, a school may deputize Planned Parenthood to teach about birth control or a public official to speak about problems confronting the community without incurring a reciprocal constitutional obligation to provide a platform for each and every group and individual wishing to reach students.

A public school which prepares its students for the responsibilities of citizenship in a democracy by encouraging debate and free inquiry (particularly in a structured setting) is not permitting use of its property for unrestrained speech purposes. On the contrary, it is preserving its property for its intended governmental use.

II

WHS'S SCHOOL ACTIVITIES PROGRAM IS NOT A LIMITED PUBLIC FORUM

A. The Appropriate Focus Is The Club Program

Limited public forum analysis focuses "on the access sought by the speaker," Cornelius v. NAACP Legal Defense Fund, Inc., 473 U.S. at 801, not on the entity of which the forum is a part. In Cornelius, the Combined Federal Campaign, not the federal workplace, was the forum to which access was sought. This Court tailored its review of the evidence accordingly.

The forum to which the students seek access is WHS' activity program. Evidence about the after-hour's use of the gymnasium or the formal academic program in the classrooms is irrelevant to determining whether the student activities

program constitutes a limited public forum.[16]

B. The Trial Court's Finding Of A Closed Forum Was Correct

A limited public forum is not created by "inaction or by permitting limited discourse but by intentionally opening a nontraditional forum for public discourse." Cornelius v. NAACP Legal Defense Fund, Inc., 473 U.S. at 802; Perry Education Ass'n. v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983). The bare fact of speech does not create a limited public forum. Nevertheless, if government tolerates enough unrestrained speech, a bare formal declaration of a closed "forum"

---

[16] The students asserted below that, aside from a right of access under the Act, they had a constitutional right of access. The District Court unambiguously rejected this claim. [Pet. App. B 25]. It is unclear from its opinion whether the Court of Appeals decided this issue. [Pet. App. A 9-15]. Its citation to Widmar v. Vincent as dispositive without regard to the Act confirms that it decided both issues. [Pet. App. A 20].

will not serve to defeat recognition of a limited public forum. Id., 460 U.S. at 48.

A de facto limited public forum will not be readily inferred. In Perry, for example, access to an internal school mail system by community groups, including the Cub Scouts, YMCAs, and parochial schools, was insufficient to create a limited public forum so that a labor union also had to be allowed access. 460 U.S. at 47-48.

Crucial to the result in Perry was the conditioning of access on approval by school officials. The creation of a limited public forum is inconsistent with empowering a gate-keeper to determine who may have access. Conversely, the exercise of authority by a gate-keeper to determine which speakers will be given access demonstrates that a limited public forum has not been created. Cornelius v. NAACP

Legal Defense & Educ. Fund, Inc., 473 U.S. at 803-04 (regulation requiring advance approval of groups seeking access defeats limited public forum claim); Hazelwood School Dist. v. Kuhlmeier, 108 S.Ct at 569 (prepublication review of high school newspaper).

Because the gate-keeper in Perry functioned as a substantial barrier to access, no limited public forum existed. "[P]ermission was [not] given as a matter of course so that what appeared to be a barrier to access in theory is not such in practice." 460 U.S. at 47.

The District Court correctly applied these principles to WHS' student activities program and found that the program was not a limited public forum. "Clearly the facts do not establish that WHS has a policy in practice of 'indiscriminate use' of its facilities by student organizations

or the general public." Pet. App. B 25. Without setting aside this and supporting factual findings as clearly erroneous, the Court of Appeals found Widmar v. Vincent, 454 U.S. 263 (1981) dispositive of the limited public forum issue.[17]

Perry and Cornelius teach that the existence of a limited public forum depends on a showing of intent to permit unrestricted speech. Questions of intent are questions of fact, subject to the clearly erroneous rule. Anderson v. City of Bessemer City, 470 U.S. 564 (1985); Pullman-Standard v. Swint, 456 U.S. 273 (1982).

---

[17] The Court of Appeals explained only that, under the Act, a limited public forum existed because at least one non-curriculum club (the chess club) was recognized [Pet. App. A 19-20]. Even if that description of the chess club as noncurriculum related is accurate, Perry plainly holds that an occasional grant of access, without more, does not call a constitutional limited public forum into being. See n.23, infra.

The Court of Appeals erred in setting aside the District Court's finding that the student activities program was not a limited public forum without explaining why that court's factual finding that School officials had created a closed forum as part of the School's overall educational program was clearly erroneous. That the Court of Appeals might disagree with the educational justifications for one or more of the clubs does not suffice to demonstrate an intent on the part of School officials to open the activities program to unrestrained speech.[18] A

---

[18] Widmar is easily distinguishable. College officials there could not credibly claim, as the trial court found WHS could, that their student activities program was part of the curriculum. The club program in Widmar made no pretense of being part of the school's educational program. Similarly, in Bender v. Williamsport Area School Dist., 563 F.Supp. 697 (M.D. Pa. 1983), rev'd, 741 F.2d 538 (3rd Cir. 1984), rev'd on other gds, 475 U.S. 534 (1986), no claim was made that the "activity period is a program-related function of the school." 563 F.Supp.

finding that the asserted educational justification was pretextual would suffice, but the Court of Appeals made no such finding, and no such finding could be supported by the record.

The District Court's findings were not erroneous at all, much less clearly so. They rested on WHS' Policy 5610 regulating the student activities program and on the uncontradicted testimony by School officials about the consistent administration of that program.

Although the idea for a club may come from students or administrators, the clubs themselves do not function independently of the School but "are part of the total education program as a means of developing citizenship, holesome attitudes, good human relations, knowledge, and skills." [Policy 5610, Trial Exhibit 71, J.A. 488].

---

at 707.

Clubs are "directly under the control of the school administration" and "shall function for the welfare and the best interest of the students and the school." Id.

Three successive principals of WHS (two of whom now hold higher positions in the School system), and the current director of student activities testified uniformly to their understanding of Policy 5610 and their belief that all clubs in the student activity program were curriculum related. [J.A. 220, 362]. The trial court accepted their testimony that Policy 5610 was understood for almost 30 years to require School officials to determine whether a proposed club would further WHS' educational goals and mission before allowing it to function as part of the student activities program. [J.A. 241, 290-93, 343-44, 358-60].

Approval of proposed clubs by School administrators was not automatic. Actual practice reflected the unwritten understanding of School officials. Clubs were rejected because they served no useful function, served too few students, or conflicted with WHS' "goals and mission." [J.A. 241-42, 293-94, 357, 363, 367]. For example, a proposed "Dungeons and Dragons" club was rejected as inconsistent with school values. [J.A. 367].

In keeping with the view that student activities were an integral part of the WHS educational program, School officials required student clubs to present controversial subjects in a balanced way. [J.A. 245-58]. Political or religious clubs, which by their nature School officials could not require to provide balance, could not be recognized as student activities. [J.A. 488, Trial

Exhibit 71]. Indeed, the requirement of balance is inconsistent with the type of unrestrained speech characterizing a limited public forum.

Moreover, every student club was required to have a sponsor who was not present only to preserve order, the sole function of teacher monitors in most litigated equal access cases[19], but with development of club goals and objectives, insuring a club's compatibility with the "goals and mission" of WHS and its balance in regard to controversial issues. [J.A. 239, 250-51, 298-99, 311, 426, 441-43].

---

[19] See, e.g., Bender v. Williamsport Area School Dist., supra, 563 F.Supp. at 700, n. 5; Lubbock Civil Liberties Union v. Lubbock Ind. School Dist., 669 F.2d 1038, 1047 (5th Cir. 1982); Bell v. Little Axe School Dist., 766 F.2d 1391, 1400 (10th Cir. 1985). Teachers in Garnett v. Renton Area School Dist., supra, like teachers in WHS, were required to maintain the substance of the clubs activities. As the Ninth Circuit recognized, that fact was of substantial relevance in determining that Renton's schools were not limited public forums.

Some clubs did not require as much faculty control and direction as other clubs. [J.A. 251, 272-73, 370-71]. Some sponsors were not always as diligent as School officials might have wished, but School officials were clear about what they demanded--active participation and leadership by sponsors to direct and control clubs in the activities programs. [J.A. 259-62, 294-96, 322-23, 374-75].

These restrictions on student activities were not a lingering vestige of a time when school officials ran schools with little regard for the abilities or rights of students. [J.A. 354]. The decision to maintain a student activities program as part of the curriculum so as to provide a "supervised learning experience for . . . students," Hazelwood School Dist. v. Kuhlmeier, 108 S.Ct. at 569, was the product of a conscious educational

decision, which was made not in reaction to the passage of the Equal Access Act, but made and practiced for many years prior.

The students' own expert, Dr. Ward Sybouts, testified that WHS' policy reflected a legitimate and well-accepted view of the proper role of student activities. Griffin, Student Activities in the Middle School: What Do They Contribute, N.A.A.S.P. Bulletin (April 1988) at 87. Indeed, he admitted that it was his own view. [J.A. 406-08, 416].

In short, far from being clearly erroneous, the District Court's finding that the clubs were part of the School's educational program accurately describes WHS' student activities program.

C. WHS Has Legitimate Pedagogical Reasons For Refusing To Recognize A Christian Bible Club

Over and apart from the Establishment Clause (see Point IV, infra), School officials may deny students access to a platform created by the School when student speech may be "erroneously attributed to the School" or when it might "associate the School with any position other than neutrality on matters of political controversy,"[20] provided that decision is "related to legitimate, pedagogical concerns." Hazelwood, 108 S.Ct. at 571. The stricter scrutiny applied to restrictions on student speech in Tinker v. Des Moines Independent School Dist., 393 U.S. 503 (1969) is applicable only to

---

[20] Given the special solicitude of the Establishment Clause for separating church and state in the public schools, Edwards v. Aguillard, 107 S.Ct. 2573, 2577 (1987), no lesser rule can be applicable to the need to maintain the appearance of religious neutrality.

private student speech, not speech from a school provided platform.

By Board Policy 5450, WHS tolerates private student speech, religious and otherwise. [Trial Exhibit 72, J.A. 489]. Students and administrators both testified that no effort was made to interfere with informal religious fellowship or prayer meetings. [J.A. 105-06, 128-30, 135-36, 140, 176, 193-94, 203-04, 426-28, 493]. Religious speech at WHS was not rooted out and suppressed, Stalinist style. This case, then, is not about whether religious speech may be suppressed, but whether, in pursuit of a legitimate pedagogical program, School officials may decline to incorporate into a student activities program [J.A. 252] a religious club with an agenda including proselytizing.

Avoiding the appearance of political or religious partisanship is a legitimate

justification for denying access to a nonpublic forum. Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788 (1985); Greer v. Spock, 424 U.S. 828 (1976); Lehman v. Shaker Hts. Rapid Transit, 418 U.S. 298 (1974). WHS' interest in avoiding identification with a religious club is no less significant than the CFC's interest in avoiding entanglement with controversial advocacy groups, or the military's or transit authority's interest in avoiding political partisanship.[21]

School officials also testified that the creation of a limited public forum, with a concomitant right of access by

---

[21] In those cases, the entity's interest was a matter of policy. WHS, in contrast, has a legal duty to avoid "plac[ing] the government's weight behind an obvious effort to proselytize on behalf of a particular religion." Allegheny County v. Greater Pittsburgh ACLU, 109 S.Ct. 3086, 3137 (1989) (Kennedy, J., concurring and dissenting); Edwards v. Aguillard, 107 S.Ct. at 2577.

groups of all stripes, including, for example, the Ku Klux Klan, Black Panthers, or clubs like Dungeons and Dragons, would amount to a betrayal of the trust parents place in WHS. When it comes to assuring a pedogogically sound environment, parents understandably do not have the same confidence in the desires of their children's peers, and particularly those fronting for adults committed to a program of indoctrination, as they do in school officials. For this reason, and not due to hostility to religious viewpoints, School officials expressed the view that it would be preferable to narrow or partially close the activities program rather than allow a religious club to function in a limited public forum. [J.A. 493-94].[22]

---

[22] Cornelius and Perry hold that, in a nonpublic forum, viewpoint discrimination is prohibited. No such discrimination exists at WHS. The refusal to recognize the Christian Bible Club was not intended

D. **The Christian Bible Club Would Radically Restructure The Forum**

A school-appointed sponsor cannot control or encourage the activities of a student religious club, Engel v. Vitale, 370 U.S. 421 (1962) as sponsors of other student activities must. Recognizing this, the Christian Bible Club offered to forego its "right" to a sponsor.

---

to suppress Christianity or religion in general. The same rule applied to all groups which advocate an ideology; indeed, the denial of the privilege of recognition extended to even non-ideological groups which did not further the "goals and mission" of WHS. Dr. Findley testified without contradiction that religious and nonreligious clubs not admitted to the official program were treated alike. [J.A. 452-54]. As in Cornelius, the distinction between recognized and nonrecognized groups, based in part on a criterion of nonpartisanship, in not per se viewpoint discrimination. Moreover, officials told students that they could continue to meet at School as they had in the past. School officials volunteered to facilitate a meeting place in a neighboring church. [e.g., J.A. 82-84]. These facts are impossible to reconcile with viewpoint discrimination against Christianity or religion in general.

There is far less to this offer than meets the eye. In waiving the right to a sponsor, the students dispense with a burden many, if not most, clubs would be happy to discard. Because a religion club cannot be "more equal" than secular clubs under an equal access theory, acceptance of the waiver to the right to a sponsor would require School officials to eliminate the sponsor for all clubs at WHS. That change would substantially alter the nature of the activities program. The free speech right to equal access for religious clubs recognized in Widmar v. Vincent, 454 U.S. 263 (1981), and relied on by the students, is one of access to, not transformation of, a forum. Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. at 48.

III

WHS HAS NO NONCURRICULUM RELATED CLUBS FOR PURPOSES OF THE EQUAL ACCESS ACT

The Eighth Circuit determined in rigid and mechanical fashion that WHS had a limited public forum under the Equal Access Act.[23] Its reasoning took the form of a syllogism: chess clubs were cited in the Congressional debate as exemplifying noncurriculum-related clubs, creating a limited public forum; WHS had a chess club; therefore, WHS had a limited public forum for purposes of the Act. [Pet. App. A 14].

The court did not otherwise define the statutory phrase "noncurriculum

---

[23] The Act as enacted deleted a proposed section creating a private right of action. The existence of a private right of action was not raised below, and the Eighth Circuit did not pass on it. The Third Circuit has held that the Act does create one. Student Coalition for Peace v. Lower Marion School Dist., 776 F.2d 431 (3d Cir. 1985).

related." Nor did it explain why, or even if, it found "clearly erroneous" the trial court's contrary factual finding that all WHS clubs are curriculum related and tied to the educational function of the School. [Pet. App. B 25-26].

The District Court did not read the statute as creating an independent federal definition of noncurriculum relatedness. Instead, it understood the statute to require an analysis of a school's explanation of its curriculum and of why particular clubs are considered to be related to that curriculum.

To determine whether the Act is triggered by a noncurriculum-related club requires resolution of several related questions: (1) whether the Act prescribes a uniform federal definition of the curriculum or whether it defers to the policies of local schools; (2) under

either possibility, whether judges should apply the definition de novo, or whether they should accord substantial deference to the views of School official; and (3) how close the fit must be between the curriculum and the activities of a club.

The Act does not explicitly address any of these questions. The answers lie in the Act taken as a whole. Contrary to the position of the Eighth Circuit, which would have all of these questions answered by the federal judiciary applying a rule construing curriculum-relatedness quite narrowly, it is clear that the Act contemplated only a limited federal role (both for the Executive and Judicial Branches) in determining educational policy.

A. **The Act Balances Three Concerns**

Three policies are embodied in the Equal Access Act: the free speech rights

of students; the nonestablishment of religion; and the autonomy and discretion of local School officials. The rights of students are manifest in the ban against content discrimination among noncurriculum-related clubs, religious and secular. The Establishment Clause concerns, discussed in greater detail below (Point IV, infra) led to inclusion of several sections dealing with the special problems created by religious clubs; the autonomy of local School officials likewise received sustained and sympathetic attention from Congress.

From the beginning, equal access proposals were modeled on the limited public forum concept applied to college-level religious clubs in Widmar v. Vincent.[24] The first equal access

---

[24] Congress twice used the term of art "limited public forum" in describing the situation to which the Act's nondiscrimination principle applied. 20 U.S.C.

proposals simply required school districts having a general policy of allowing student clubs to meet during "noninstructional" periods to allow religious clubs to meet as well. Failure to comply led to a cutting off of federal funds.

---

§4071(a) and (b). When Congress uses a term-of-art whose meaning is well settled, "it is presumed, absent an express statement to the contrary, that Congress intended to adopt the interpretation placed on that concept by the Courts." Davis v. Michigan Dep't. of Treasury, 109 S.Ct. 1500, 1506 (1989). Since no constitutional limited public forum exists at WHS, none should exist for purposes of the Act either. Section 4071(b) states that a limited public forum exists when a school "grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises." This obscure language was introduced as part of the last minute substitute language. Note 26 infra. The "one or more" language is, nevertheless, not a departure from the principles of Perry. The legislative history, 130 Cong. Rec. S. 834 (daily ed. June 27, 1984) (remarks of Senator Leahey) makes clear that change was intended to make clear that the key question was not whether a school said it had a closed forum but whether it in fact had one. That is entirely consistent with Perry, 460 U.S. at 48.

Nonreligious speech was not protected by the early proposals. See, e.g., S. 1059, 98th Cong. 1st Sess. (1983); H.R. 2732, 98th Cong. 1st Sess. (1983); H.R. 4172, 98th Cong. 1st Sess. (1983). Opponents expressed concern that, as drafted, the legislation injected the federal government too far and too drastically into matters traditionally and best left to school boards.

In response to these concerns, several sections were added. One prohibited cutting off federal funds as a sanction for violating the Act, 20 U.S.C. § 4071(e), and another provided that schools retained authority to prohibit "meetings . . . otherwise unlawful." 20 U.S.C. § 4071(f).

The early bare-bones language was also rewritten to make explicit that school officials remained free to decide

whether to create a limited public forum. As a House co-sponsor, Representative Goodling explained:

> [T]he bill only applies if the school voluntarily creates a limited open forum. Everything is left to the local option. Everything is left to the local administration and the local school board.

130 Cong. Rec. H 7732 (daily ed. July 25, 1984).[25] In light of this concern for preserving local educational control, it is hardly surprising that the statute, which defines several other key phrases (see 20 U.S.C. § 4072), fails to define "noncurriculum-related."

In the American political tradition, the task of defining curriculum is entrusted to local, not federal, authority. Board of Educ., Island Trees School District v. Pico, 457 U.S. at 63-

---

[25] Representative Goodling was the senior minority member of the House Education and Labor Committee and served as floor manager of the bill.

64; Epperson v. Arkansas, 393 U.S. 97 (1968); 20 U.S.C. § 953(c) (National Endowment for the Arts may not control curriculum); 20 U.S.C. § 3403(c) (same as to Department of Education). Congress' failure to provide a uniform federal definition of curriculum-relatedness, given both the larger political tradition and the specific concerns expressed in connection with the Act, reflects a deliberate decision to allow local school officials to employ a local definition of curriculum, subject only to judicial review to insure against abuse.

The Senate floor debate supports this construction of the Act. Senator Hatfield, Senate sponsor[26] of the language

---

[26] The present Equal Access Act took the form of the Denton-Hatfield Amendment No. 3152, introduced in the Senate on June 6, 1984, as an amendment to S.1059, already reported to the floor by a Senate Committee. 130 Cong. Rec. S.6651 (daily ed.). It was debated in the Senate on June 27. 130 Cong. Rec. S.8331-8372.

which was ultimately adopted, emphasized in a colloquy with Senator Gorton that school boards had to decide which clubs were curricular:

> Mr. Gorton: Would the school district have full authority to determine whether the line is to be drawn between curriculum-related activities and noncurriculum related?
>
> Mr. Hatfield: We in no way seek to limit that discretion.
>
> Mr. Gorton: So if the school district were to determine that the girl's cheerleading squad, for example, should be led by a teacher, it could make the determination that it was curriculum-related.

Several changes were made in the amendment between the time of the substitutes' introduction on June 6 and the debate on June 27. These were introduced as a perfecting amendment on the 24th. 130 Cong. Rec. S.8338 (daily ed. June 24, 1984). The House, having failed to adopt an earlier version of the Act, 130 Cong. Rec. H.3855 - H.3879 (daily ed. May 15, 1984), ultimately accepted the Senate's version on July 25. 130 Cong. Rec. H.7723 - H.7745 (daily ed.).

The Senate debate is by far more comprehensive. The House considered the bill under a suspension of the rules, allowing only for one hour of debate, 130 Cong. Rec. H.7723 - H.7740 (daily ed. July 25, 1984). Most of that debate consisted of set speeches on the First Amendment.

Mr. Hatfield: Correct.

Mr. Gorton: And, therefore, the existence of that group would not be a nonrelated forum?

Mr. Hatfield: Correct.

Mr. Gorton: Could the school make the same determination with reference to a chess club?

Mr. Hatfield: I would not say that no school official could, but I cannot readily conceive of a criterion at this time that could be used to establish that as a curriculum-related activity . . . 130 Cong. Rec. S.8342.

The Court below cited only an earlier portion of this exchange in which Senator Hatfield expressed the unequivocal view that a chess club was not curriculum related. Id. Accordingly, it held that the existence of a chess club at WHS conclusively proved the existence of a limited public forum. That reasoning takes Senator Hatfield's views wholly out of context and ignores the larger thrust of his remarks and the statutory framework as a whole.

The Court of Appeals construed the statute in this artificial way because it feared that allowing each local school board to define its curriculum would allow the Act "to be easily circumvented by administrative decree." [Pet. App. A 14].

Plainly, school officials cannot evade the Act with sham claims of curriculum relatedness. But "Courts are capable of distinguishing a sham," Wallace v. Jaffree, 473 U.S. 38, 75 (1985) (O'Connor, J., concurring), without having to substitute their own judgments for that of school officials. Local control of education ought not to be discarded on the off-chance that some fraudulent claims will not be detected by a federal court.

Since "noncurriculum-related" is not defined in the statute itself, yet under the views of the court below it is not a decision to be made locally, school

administrators are left without guidance to determine whether a school has a limited public forum. Other than the few clubs cited in the legislative history as noncurriculum-related (indeed, only chess club was so cited), school officials attempting to comply with the Act would have no way of knowing, short of litigation, which of their clubs are curriculum-related.

Judges are not well-situated by training or experience to make de novo judgments about educational policy. And reliance on the legislative history alone is inappropriate. Legislators are not educators, and they can be and are often wrong about what is curriculum-related. Moreover, the Court of Appeals' approach of mechanically applying the legislative history freezes certain clubs into a noncurriculum-related status merely

because Congress (or some members of Congress) thought in 1984 that they were not related to the curriculum. Computers may have been unrelated to the curriculum when the authors of this brief went to school; they are curriculum-related now. Chess, to take another example, is increasingly considered a game that teaches logic, strategy, and planning for alternatives, yet some members of Congress thought it unrelated to the curriculum.

The alternatives are not as stark as the Eighth Circuit thought. It is possible to allow school districts substantial leeway to define the curriculum and yet police against invasions of the federally protected rights of students.

The correct standard was enunciated by the Ninth Circuit in Garnett v. Renton School Dist., 874 F.2d 608, 614 (9th Cir. 1989). That court held that the Equal

Access Act "does not expressly depart from th[e] principle of deference to the judgment of school officials" generally binding on the federal courts. 874 F.2d at 614. On the other hand

> while we accord some deference to a school district's determination about whether a group is curriculum related, we cannot completely defer to a school district's determination. Complete deference would render the Act meaningless because school boards could circumvent the Act's requirement simply asserting that all student clubs are curriculum-related.

In view of these conflicting principles, the Ninth Circuit held that definition of the curriculum is primarily a local responsibility but not one without limits in this context. In enacting the Act, Congress did not claim the task of defining curriculum for itself, or assign it to federal judges. The Eighth Circuit unnecessarily trammeled on the authority of WHS officials when it arrogated to

itself the decision de novo whether certain clubs were curriculum-related.

B. WHS' Clubs Are Curriculum Related

The statute also does not spell out how close the fit must be between the curriculum and a club for it to be curriculum-related.[27] For Senator Hatfield, clubs which were "an extension of the classroom" were curriculum related. 130 Cong. Rec. S.8342 (daily ed. June 27, 1984). In the House, a more elaborate test was suggested by Representative Goodling:

> First, is the subject matter of the meeting of a type which a public school could sponsor? In other words, the meeting must be academic, athletic, or musical to be curriculum related. A Latin club, a soccer team, and school band would all clearly fall within this category. A

---

[27] The respective committee reports, addressed to earlier versions of the legislation, do not address any of the questions discussed in the text. S. Rep. No. 98-357, 98th Cong., 2d Sess. (1984); H.R. Rep. 98-710, 98th Cong., 2d Sess. (1984).

> young Democrat or Republican club, private social organizations, or religious groups would not be of the type which a school could sponsor.
>
> Second, does the school or a school teacher require or directly encourage student participation in such group in connection with curriculum course work?[28]

130 Cong. Rec. H.7732 (daily ed. July 25, 1984).

The ten clubs singled out in the pretrial order as allegedly noncurriculum related [J.A. 60], as well as the remaining 23 student activities [Trial Exhibit 63, J.A. 479], easily meet the first part of Representative Goodlings' test. None are of the type that a school is constitutionally forbidden to support.

---

[28] Senator Hatfield may have had the second branch of Representative Goodling's test in mind when he said that athletic clubs are curriculum related because tax dollars may be expended on them. 130 Cong. Rec. S.8342 (daily ed. June 27, 1984).

In fact, WHS prohibits School sponsorship of political or religious groups.

Both the Senate's "extension of the classroom" and the House's "require or encourage participation" tests are easily met by WHS' activities program. WHS actively encourages participation in its entire student activities program. [J.A. 344, 435-436].

All recognized clubs participate in a "Club Fair" designed to acquaint students with the clubs that may interest them. Students are aggressively recruited on these occasions. [J.A. 101, 422,423, 430]. Homeroom advisors also inform students of clubs which might be of interest to them. [J.A. 36]. Community projects undertaken as part of Zonta or Interact are eligible for extra credit in sociology class. [J.A. 226]. Undoubtedly, the possibility of boosting a grade

"encourage" participation in the sense that Congress had in mind.

School officials, moreover, testified at length as to why each of the clubs claimed by the students to be noncurriculum related was in reality an extension of the classroom. The District Court found this testimony to be credible, and its findings were not and cannot be set aside as clearly erroneous.

Subsurfers, for example, functioned as an extension of the School's swimming program, in turn a part of the School's formal athletic program. Athletics are curriculum related.[29] WHS' athletic program was designed to acquaint students with activities such as swimming or scuba diving which, unlike competitive team

---

[29] See, e.g., 130 Cong. Rec. S.8342 (remarks of Senator Hatfield); 130 Cong. Rec. 7732 (remarks of Representative Goodling (daily ed. July 25, 1984); S. Rep. 98-357, 98th Cong., 2d Sess. at 38 (1984).

sports, are likely to be pursued throughout adulthood. [J.A. 305-06].

Photography was no longer a club when this case was tried but a full-fledged class, part of WHS' extensive art department. It was treated as a club only so long as a state-certified photography teacher was unavailable. [J.A. 444-45]. Plaintiffs made no effort to prove that the club was not related to course work in the Art Department.

WHS has an extensive program of business courses, including accounting, marketing, and sales development. [J.A. 448-50]. WHS' Future Business Leaders of America ("FBLA") chapter rounded out this formal classroom instruction in business with programs emphasizing practical business skills and relating these "to school work and activities." [J.A. 354].

FBLA prepared students for careers in business, whether immediately "in the world of work or . . . going on to college." [J.A. 447-48]. School officials asserted that FBLA reinforced what students learned in the classroom about "entrepreneurship, free enterprise system . . . the overall global kinds of things they need to know if they're going to go into a business-related career," Id.[30]

Chess, too, contributed to academic performance in mathematics courses [J.A. 220-21, 304; Tr. 498], so much so that the math department at one time requested that chess be permitted in its resource room. That ultimately proved impracticable, and chess is now conducted

---

[30] WHS was not alone in encouraging student's taking business courses to participate in this club. The Nebraska Department of Education urged all schools to encourage student participation in FBLA. [J.A. 448].

as a club which meets elsewhere.[31] [J.A. 443-444].

Zonta and Interact are not private social organizations, but community service clubs which serve to stimulate student interest and participation in community service projects. [J.A. 225-26, 288-89, 305-06].[32] School officials across the country now recognize that life-long commitments to community service cannot be left to the happenstance of private conscience [J.A. 437] but must be

---

[31] WHS' view that chess contributes to performance in math, science, and computers is hardly idiosyncratic. Recent reports confirm that playing chess strengthens academic performance. N.Y. Times, July 19, 1989, p. C-5, col. 1.

[32] This Court has taken note of the quasi-public nature of Rotary and its commitment to community service. Board of Directors of Rotary Interr. v. Rotary Club, 479 U.S. 537, 546 (1987). In an amicus brief filed in that case, Zonta International described itself as an "international women's service organization" (Brief at 3) "quite similar" (Brief at 5) to Rotary.

nurtured by the public schools. See, e.g., Title I of the proposed National Community Services Act of 1989 (S.1430) providing grants for encouraging community service in the public school, especially when the program (§ 106[c][a][D]) is "integrated into the academic program . . ." Accord, Menacker and Wynne, Helping Students to Serve Society, Phi Delta Kappan (F.S. 1982) at 381. Zonta and Interact exemplify that approach while furthering the "goals and mission" of WHS to train good citizens. [J.A. 225-26]. Whatever social fraternization occurs in these activities (as well as in other clubs conceded to be curriculum related) is, from WHS' point of view, incidental to their curriculum-related purposes.

Two of the remaining clubs are not clubs in the ordinary sense. The National

Honor Society, as far as the students demonstrated, has no existence beyond its name. It is an academic honor, like dean's list or valedictorian. It would be entirely perverse, and it would enshrine anti-intellectualism into law, if the Act were construed to treat cheerleaders as curriculum related, as the legislative history indicates is the case (130 Cong. Rec. S.8342 daily ed. June 27, 1984) (remarks of Senator Hatfield), but not a group dedicated to honoring academic achievement.

Welcome to Westside is a buddy system for new students; it holds no meetings. [J.A. 201]. WHS educates 1,450 students. New students can easily get lost in so large an institution. WHS has an interest in informing new students where various services and classes may be found and which administrators or guidance

counsellors can resolve particular problems. It also has an interest in easing the social integration of new students. [J.A. 305, 328-29].

Some of these tasks might be performed by School personnel, but it is surely reasonable for School officials to conclude that students can do it at least as well, if not better. Since WHS has as one of its "goals and mission[s]" teaching students that they have a responsibility to their community, it is entirely reasonable for School officials to assign these tasks to students. Welcome to Westside is not a vehicle for student speech but for furthering institutional needs.

The remaining activities alleged by the students to be noncurriculum related are the Student Forum and the Student Advisory Board, which together comprise

the student government. According to School officials, student government reinforces the specific curriculum of the social studies department. [J.A. 270-73, 306, 445-47]. The "goals and mission" of WHS are to teach students the skills needed to participate in a democracy--the "role and purpose of the American public school system." Bethel School Dist. v. Fraser, 478 U.S. 675, 681 (1986).

Like Welcome to Westside, student government does not serve as a vehicle for self-expression; rather, it draws students into the operation of the School, gives them a stake in its success, and provides administrators with a vehicle for communicating with, and hearing from, students. As then Chief Justice Burger put it in Healy v. James, 408 U.S. 169, 195 (1972) (concurring opinion), "part of the educational experience of every

college student should be an experience in responsible self-government, and this must be a joint enterprise of students and faculty." (emphasis added).

IV

THE CONSTITUTION FORBIDS INCORPORATING A RELIGIOUS CLUB INTO AN OFFICIALLY SPONSORED STUDENT ACTIVITIES PROGRAM

The construction of the Act adopted by the Ninth Circuit in Garnett, and which we have urged upon the Court, is appropriate because it is a correct interpretation of the plain language of the statute and accurately reflects its legislative history. Moreover, construing the Act to allow substantial leeway to local school officials to define curriculum in accordance with local practice also has the substantial advantage of avoiding the Establishment Clause problems which would arise if the Act were applied, as it was by the Eighth

Circuit, to require WHS to welcome a religious club into its official student activities program. Public Citizen v. United States Department of Justice, 109 S.Ct. 2558, 2558, 2572-73 (1989). The constitutional issues are particularly grave here because the Act is sought to be applied to a school which permits informal religious speech, refusing only to lend that same speech its official approval.

A. The Students Seek Endorsement of Their Religious Club

The students made it clear beyond question that what they sought was not only the right to engage in religious speech (a right which was not denied them), but official recognition of their Christian Bible Club. This would entail equal treatment with all other school sponsored clubs [Pre-trial Order #13, J.A. 59], and include a right of access to school controlled mediums of

communication -- the loudspeaker, the school newspaper, and bulletin boards. [e.g. J.A. 107, 132, 155-56]. As one student put it in explaining why informal meetings were not adequate, "I'd want to be recognized as any other club that meets at school because otherwise I feel that it's discrimination." [Tr. 129].

The students seek, in other words, a judicial order requiring WHS to count among its "goals and mission" Christian fellowship and the evangelization of "non-religious" students [J.A. 252], or those students who "would like to become Christians and follow God" (as one student put it) [J.A. 185].

The student activities program at WHS does not exist separate and apart from the School; it is an integral part of the School's educational function. The School does not merely make space available for

student activities, it encourages participation in these programs, controls their activities, and rejects those activities which it regards as unreflective of the community values it espouses. The request for recognition of a Christian Bible Club is nothing less than a request for the School to incorporate religious activities into its official program, and thereby to have school officials endorse participation in the religious club and provide the club with an official platform from which students can reach non-religious students. [J.A. 285].

No citation of the authority is necessary to reject this unprecedented claim. A school cannot have as even one of its "goals" the reinforcing of religious beliefs among believers, or the spreading of the "Good News" of the Gospel

to non-believers. These are not within the legitimate "goals and mission" of any public school or of any government agency. What the students seek is a union of state and religion. It is precisely such a union which the Establishment Clause forbids. Grand Rapids School Dist. v. Ball, 465 U.S. 373 (1985); Larkin v. Grendels Den, 459 U.S. 116 (1982).

Since the students seek government sponsorship of religious speech, wrapping their claim in the flag of non-discrimination does not aid them. As this Court recognized unanimously in Widmar v. Vincent, 454 U.S. 269, 271, n.9 (1981), the Constitution itself requires discrimination between government sponsored secular and religious speech. More recently, this Court was even more forthright in rejecting an analogous claim, saying that it "contradicts the

fundamental premise of the Establishment Clause." County of Allegheny v. ACLU, 109 S.Ct. 3086, 3110 (1989).

Nor does Widmar support the students' right to have their religious club recognized by this School. The Court rejected the University's Establishment Clause argument in that case because the religious club would function in a public forum. Although title to a public forum rests with the government, those using the forum for speech are not doing so at the behest or sufferance of government, and the reasonable person does not understand speech in such a forum to enjoy government's approval. Speech in a public forum is not governmental speech, and, unless the forum is created primarily to facilitate religious speech, the Establishment Clause is not implicated.

At WHS, the student activities program is not merely capable of being mistaken for government speech. It is government speech. The Establishment Clause, therefore, would be violated by granting the students what they seek -- official endorsement of their religious views.

B. An Officially Sponsored Christian Bible Club Would Entangle the School With Religion

Given the structure of WHS' activity program, granting the student request for a Christian Bible Club would unduly entangle WHS with religion. Every club at WHS has a sponsor, who is far more than a glorified babysitter. The sponsor is charged with actively directing the activities of each group, guiding its student leaders, shaping its program, and ensuring balance in the presentation of

controversial ideas and conformity with the "goals and mission" of WHS.

Unless WHS were to modify its requirements for all clubs, or waive it on a preferential basis for the Christian Bible Club, the publicly appointed and paid sponsor would be charged with influencing and controlling the club's religious program.

The students thus seek to mandate "a kind of continuing day-to-day relationship" between church and state, Aguilar v. Felton, 473 U.S. 402, 414 (1985), thus setting up "[a] comprehensive, discriminating and continuing state surveillance" of religious activity impermissible under the Establishment Clause. Lemon v. Kurtzman, 403 U.S. 602, 619 (1973).

C. The Court Need Not Reach the Impressionability Issue

The students' insistence on school endorsement of their Club and the inevitable entanglement which would follow were their request granted, means that recognition of this particular Christian Bible Club would construct a relationship between church and state which is improper without regard to the age of the students and their impressionability.

It is therefore unnecessary to consider whether the trial court incorrectly credited expert testimony that, in theory, high school students are as capable as college students of understanding when a school is endorsing religion in the face of contrary testimony by school officials about the actual ability of WHS' students to make such distinctions, as well as caveats in the

expert's own testimony about the varying abilities of individual teenagers.

Nor is there any need to consider whether these findings are inconsistent with this Court's repeated holdings that secondary school students are more impressionable than college students. See, e.g. Edwards v. Aquillard, supra; Widmar v. Vincent, 454 U.S. at 274, n.14.

The construction of the statute we have urged would further avoid any inquiry into the legitimacy of a purported Congressional finding that high school students are not impressionable, a finding based on the testimony of not a single psychologist or expert in child development. The court below believed itself bound by that finding. (Pet. Cert. App. A-19-20). Yet that Congressional "finding" appears inconsistent with this Court's repeated contrary conclusions, and

may simply manifest Congressional defiance of lower court legal conclusions with which it disagreed. See Cert. Pet. at p. 18, n.5 and p. 21, n.7.

CONCLUSION

The claim for equal treatment for religious and secular speech is appealing. Perhaps a school which permits any club to meet, which tolerates Democratic, Republican, anarchist and Marxist clubs as part of its activity program, and which exercises little or no control over their activities, should be required to tolerate a Bible club. WHS is not that school, and what these students are complaining about are not obstacles to religious speech, but the School's refusal to lend them its prestige and endorsement.

For the reasons stated, the judgment of the Eighth Circuit should be reversed, and the judgment entered for the petitioners.

Allen E. Daubman
Counsel of Record
Verne Moore, Jr.
Koley, Jessen, Daubman
& Rupiper, P.C.
One Pacific Place, Suite 800
1125 South 103rd Street
Omaha, Nebraska 68124
(402) 390-9500

Marc D. Stern
Amy Adelson
Lois C. Waldman
Jeremy S. Garber
American Jewish Congress
15 East 84th Street
New York, New York 10028
(212) 879-4500